

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS for CS for SB 564, SB 2120 and SB 2620

SPONSOR: Committee on Judiciary, Health, Aging, and Long-Term Care and Senator Saunders and Senator Peaden

SUBJECT: Medical Malpractice

DATE: April 11, 2003 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.	Matthews	Roberts	JU	Favorable/CS
3.	_____	_____	AP	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The bill revises provisions relating to medical malpractice claims and actions as follows:

### *Legislative Findings*

- Provides legislative findings in support of the need for comprehensive medical malpractice legal reform.
- Provides legislative findings regarding the need for emergency services and commensurate immunity for providers of such services.

### *Expert Witness*

- Revises the criterion for who and how someone can be qualified to offer a presuit medical expert opinion or to offer expert testimony at trial regarding the prevailing professional standard of care in medical malpractice claims.
- Revises the provisions governing when the court must dismiss a claimant’s suit, strike a defendant’s pleading, report a medical expert disqualification to the Division of Medical Quality Assurance, or refuse to consider the testimony or statement of a medical expert, to incorporate reference to the new criteria for qualifying medical experts.
- Prohibits contingency fees for expert witnesses.
- Requires attorneys offering expert witnesses to certify that there is no criminal history of perjury or fraud.

### *Presuit Activity*

- Expands informal discovery in presuit screening and investigations to require a claimant to execute a medical information release and to allow 30 written questions.

- Requires a claimant's presuit notice sent to a prospective defendant to include a list of health care providers seen predating and following the medical malpractice injury and copies of all medical records relied upon by the claimant's presuit expert witness.

#### *Legal Action*

- Mandates mediation in medical malpractice actions.
- Expands consideration of factors for the court to consider to include a review of expert witness written opinion for dismissing a claimant's suit, striking a defendant's pleading, reporting a medical expert disqualification to the Division of Medical Quality Assurance, or refusing to consider the testimony or statement of a medical expert.

#### *Damages*

- Allows for a set-off against a medical malpractice judgment if there is an executed written release or covenant not to sue in medical malpractice claims.
- Clarifies that a claimant's recovery in medical malpractice voluntary binding arbitration proceedings is governed to the extent entitled by general law and the Wrongful Death Act.
- Requires specific itemization of damages as part of the verdict in medical malpractice action.
- Limits the apportionment of fault and damages in the jury verdict form solely to the claimant, if any, and all the joint tortfeasors who are parties to the action at the time the matter is submitted to the jury.

#### *Immunity*

- Extends civil immunity under the "Good Samaritan Act" to hospitals and their employees providing services in emergency scenarios and to licensed health care practitioners responding and rendering services in good faith in specified emergency scenarios.
- Provides the applicable standard of care for recovery against the licensed health care practitioner under the Good Samaritan Act as conduct that shows reckless disregard for the life or health of the victim and defines "reckless disregard" for purposes of limiting immunity under the Good Samaritan Act.
- Extends sovereign immunity to health care providers, with exception, obligated by state or federal law to provide emergency services in a hospital and requires such providers to indemnify the state up to the statutory or policy limit.

This bill amends the following sections of the Florida Statutes: 46.015, 456.057, 766.102, 766.106, 766.108, 766.202, 766.206, 766.207, 768.041, 768.13, 768.28, 768.77, and 768.81.

## **II. Present Situation:**

### **Governor's Select Task Force on Healthcare Professional Liability Insurance**

In August 2002, the Governor appointed a Select Task Force on Healthcare Professional Liability Insurance to address concerns and issues regarding the affordability and availability of health care and rising medical malpractice insurance premiums. The Task Force held ten meetings at which it took testimony and discussed five major areas: (1) health care quality; (2) physician discipline; (3) the need for tort reform; (4) alternative dispute resolution; and (5) insurance premiums and markets. On January 31, 2002, the Task Force submitted to the

Governor and the Legislature a final report with 60 recommendations focusing on medical malpractice reform.<sup>1</sup>

### **Medical Malpractice**

Chapter 766, F.S., provides the statutory scheme for medical malpractice claims and actions. In any claim for personal injury or wrongful death arising from medical malpractice, it is the claimant's burden to prove that the health care provider acted negligently contrary to the prevailing professional standard of care and that the negligent act caused the injury or death.<sup>2</sup> The prevailing professional standard of care for a given health care provider is that level of care, skill, and treatment which, in light of all relevant, surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

### **Presuit Requirements Including Investigation, Screening, Discovery and Notice**

An action for medical malpractice must be initiated within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence. *See* s.95.11(4), F.S. A claimant must satisfy certain requirements prior to filing legal action, including presuit screening, investigation, discovery and notice.<sup>3</sup> Prior to sending a presuit notice, a claimant must investigate his or her claim and obtain corroborating documentation such as a verified written medical expert opinion as to the reasonable grounds for the claim.<sup>4</sup> After completion of the presuit investigation, the claimant must send a presuit notice if he or she intends to file suit for medical malpractice. The claimant can not file a suit for 90 days after the presuit notice is mailed to any prospective defendant.<sup>5</sup>

During the 90-day period, the defendant's insurer is required to conduct a review, investigate or screen the claim to determine the liability of the defendant. To facilitate this process, the parties are required to engage in extensive informal discovery.<sup>6</sup> One of the mechanisms of informal discovery is the taking of *unsworn* statements.<sup>7</sup> Currently, any party may require other parties to appear for the taking of an *unsworn* statement. However, such statements can be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action by any party. Non-parties cannot be required to have their unsworn statements taken.

*At or before the end* of the 90-day presuit screening period, the defendant's insurer must respond to the claimant by either: 1) rejecting the claim, 2) making a settlement offer, or 3) making an offer of admission of liability and for arbitration on the issue of damages.<sup>8</sup> If an offer to admit liability and to arbitrate is made, the claimant has 50 days to accept or reject the offer.<sup>9</sup> If the claimant rejects the offer, then the claimant has 60 days or the remainder of the statute of limitations period to file legal action. If the claimant accepts the offer, the parties have 30 days to

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<sup>1</sup>See final report available at <http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf>. The report, information and documents received and meeting transcripts were compiled into thirteen volumes that accompany the main report.

<sup>2</sup>See s. 766.102(1), F.S.

<sup>3</sup>See s. 766.106, F.S., and s. 766.203, F.S., respectively.

<sup>4</sup>See s. 766.203, F.S.

<sup>5</sup>See s. 766.106(3), F.S.

<sup>6</sup>See 766.106(6), F.S.

<sup>7</sup>See s. 766.106(7)(a), F.S.

<sup>8</sup>See s. 766.106(3)(b), F.S.

<sup>9</sup>See s. 766.106(10), F.S.

settle on an amount of damages. Acceptance of the offer to arbitrate waives recourse to any other remedy by the parties. If no settlement is reached, the parties must go to binding arbitration to determine the amount of damages.

Written arguments are submitted to the arbitration panel and a one-day hearing is held. The rules of evidence and civil procedure do not apply. The arbitration panel is required to notify the parties of their determination no later than two weeks after the hearing. The provisions of the Florida Arbitration Code contained in chapter 682, F.S., are applicable to the arbitration proceeding in these actions.<sup>10</sup> The court has jurisdiction to enforce any award by the arbitration panel.

After completion of the presuit investigation, any party can file a motion in the circuit court requesting a court determination as whether the claim or denial rests is reasonably based and preceded by a reasonable investigation.<sup>11</sup> No statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party.<sup>12</sup>

No settlement agreement can include a confidentiality clause prohibiting the disclosure of settlement terms and conditions to the Division of Medical Quality Assurance within the Department of Health.<sup>13</sup> This division is responsible for investigating claims alleging professional misconduct of health care practitioners for which such practitioners may be subject to regulatory sanctions.

### **Voluntary Binding Arbitration under Chapter 766, Florida Statutes**

Additional provisions promoting the use of arbitration were added as part of a major medical malpractice law reform in 1988.<sup>14</sup> The law added more presuit requirements and provisions for voluntarily binding arbitration of medical negligence claims. Pursuant to expressed legislative intent, the arbitration provisions were for the purpose of providing:

- Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay;
- A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees; and
- Limitations on the noneconomic damages components of large awards to provide for increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

Section 766.207, F.S., provides for voluntary binding arbitration of medical negligence claims against parties other than the state or local governmental entities or its employees, officers or agents. After presuit investigation is finished and there is preliminary reasonable grounds for a medical negligence claim, either party may offer to go to voluntary binding arbitration. The

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<sup>10</sup> See s. 766.106(12), F.S.,

<sup>11</sup> See s. 766.206, F.S. See also *Wolfsen v. Applegate*, 619 So.2d 1050, 1055 (Fla. 1<sup>st</sup> DCA 1993); *Duffy v. Brooker*, 614 So.2d 539 (Fla. 1<sup>st</sup> DCA 1993) *rev. den.* 624 So.2d 267 (Fla.1993).

<sup>12</sup> See s. 766.205(5), F.S.

<sup>13</sup> See s. 766.133, F.S.

<sup>14</sup> Sections 48-59 of chapter 88-1, Laws of Florida, currently located in ss. 766.201-766.212, F.S.

opposing party may reject or accept the offer. Acceptance means the parties will be bound by the decision of the arbitration panel and the following statutory provisions:

- Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim.
- Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation.
- A defendant's or claimant's offer to arbitrate is not admissible in evidence or usable in argument during any subsequent litigation of the claim following the rejection thereof.
- An offer or the acceptance of an offer to arbitrate is not admissible as evidence of liability in any collateral or subsequent proceeding on the claim.
- The defendant is obligated to pay for the interest on all accrued damages with respect to which interest would be awarded at trial.
- The defendant is obligated to pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.
- The defendant is obligated to pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.
- The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only.
- Each defendant who submits to arbitration shall be jointly and severally liable for all damages assessed under this section.
- The hearing is to be conducted by the arbitration panel, but a majority may determine any question of fact and render a final decision.
- The chief arbitrator decides all evidentiary matters.
- The parties may settle at any time during the voluntary binding arbitration.
- Net economic damages are awardable and include but are not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.
- Awardable damages for noneconomic losses are capped at \$250,000 per incident, and are calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than \$125,000 noneconomic damages.
- Awarded damages for future economic losses may be paid by periodic payment pursuant to s. 766.202(8) and is to be offset by any future collateral source payments.
- Punitive damages are not awardable.
- A defendant who rejects a claimant's offer to arbitrate is subject to the claim proceeding to trial where there is no limitation on damages, and the claimant, upon proving medical negligence, is entitled to recover prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value, subject to a reduction for any amount recovered from any other defendant in arbitration *See* s. 766.209(3), F.S.
- A claimant who rejects a defendant's offer to arbitrate is subject to damages awardable at trial where awardable damages are limited to net economic damages, and noneconomic damages capped at \$350,000 per incident. *See* s. 766.209(4), F.S.

Arbitration precludes recourse to any other remedy by the claimant against any participating defendant. An arbitration panel is to be composed of three arbitrators, one selected by the

claimant, one selected by the defendant, and one who is an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator.<sup>15</sup> The Division of Administrative Hearings is authorized to promulgate rules for voluntary binding arbitration. If the panel can not reach an agreement, the chief arbitrator can dissolve the panel and request appointment of a new panel.<sup>16</sup>

The law also establishes a procedure for allocating responsibility among multiple defendants when there is a dispute among the defendants as to the apportionment of the damages that are awarded by the voluntary binding arbitration panel under s. 766.207, F.S.<sup>17</sup> This section provides for a separate arbitration panel and binding arbitration proceeding for apportioning financial responsibility among multiple defendants. If the panel can not reach an agreement, the chief arbitrator can dissolve the panel and request appointment of a new panel.<sup>18</sup> Voluntary binding arbitration is an alternative to jury trial and does not supersede the right of any party to a jury trial.<sup>19</sup>

Arbitration awards and allocation of financial responsibility among multiple defendants may be appealed.<sup>20</sup> An appeal does not stay an arbitration award although an appellate court may issue an order to stay to prevent manifest injustice. Any party to an arbitration proceeding may enforce an arbitration award or an allocation of financial responsibility by filing a petition in the circuit court for the circuit in which the arbitration took place

A defendant is required to pay an arbitration award within 20 days after the award of damages by the arbitration panel, to include interest at the legal rate or to submit any dispute among multiple defendants to arbitration.<sup>21</sup> Interest at the rate of 18 percent per year begins to accrue 90 days after the award.

### **Expert Witnesses in Medical Malpractice Actions**

The criteria for who may be qualified to provide presuit expert opinion regarding evidence of medical negligence or who may be qualified to testify as an expert witness are set forth in ss. 766.104(1), F.S., and 766.102(2), respectively. The prevailing professional standard of care is relative to the various categories and classifications of health care provider. Accordingly, pursuant to s. 766.102(2)(c), F.S., any health care provider may testify as an expert if he or she is a *similar health care provider* to the provider accused of medical negligence. The court has the discretion to allow someone who is not a similar health care provider to testify to the prevailing professional standard of care in a given medical field anyway if the court determines the expert possesses sufficient training, experience and knowledge as a result of practice or teaching in the specialty of the defendant, or practice or teaching in a related field of medicine.

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<sup>15</sup> This section specifies how arbitrators are to be selected if there are multiple plaintiffs or multiple defendants, requires independence of arbitrators, specifies the rate of compensation for arbitrators, and authorizes the Division of Administrative Hearings to promulgate rules for voluntary binding arbitration.

<sup>16</sup> See s. 766.21, F.S.

<sup>17</sup> See s. 766.208, F.S.

<sup>18</sup> See s. 766.21, F.S.

<sup>19</sup> See s. 766.209, F.S.,

<sup>20</sup> See s. 766.212, F.S.

<sup>21</sup> See s. 766.211, F.S.

“Similar health care provider” is defined and bifurcated into two classes: 1) *specialist* and 2) *non-specialist*.<sup>22</sup> A *specialist* is one who is certified by the appropriate American board as a specialist, is trained and experienced as a medical specialist, or holds himself or herself out as a specialist. For a *specialist*, a similar health care provider is one who is trained and experienced in the same specialty and is certified by the appropriate American board in the same specialty. A *non-specialist* is a health care provider who meets none of the aforementioned criteria. For a non-specialist, a similar health care provider is one who is licensed by the appropriate regulatory board. Additionally, the expert witness must have had active involvement in the practice or teaching of medicine within the five year period before the incident giving rise to the claim. For a *non-specialist*, a similar health care provider is one who is licensed by the appropriate regulatory agency of this state, is trained and experienced in the same discipline or school of practice, and practices in the same or similar medical community. If a health care provider provides treatment or diagnosis for a condition which is not in his or her specialty, a specialist trained in the treatment or diagnosis of that condition shall be considered a similar health care provider.

Significant litigation is generated from the interpretation and application of the current provisions governing ‘expert witnesses.’ This is compounded by the fact that the terms “medical specialty”, “specialty”, “specialist”, and “discipline or school of practice” are not defined statutorily. Frequently trial court judges allow specialists to testify against non-specialists and general practitioners.

#### **Award of Damages: The Wrongful Death Act and Medical Malpractice Law**

The Florida Wrongful Death Act is governed by sections 768.16-768.27, F.S. The Act provides a cause of action and recovery when a person causes the death of another person through a wrongful act, negligence, default or breach of contract. There is an exception for medical malpractice actions which includes a limitation as to the recovery of specific types of damages. The limitation is that the adult child of a deceased parent or the parent of a deceased adult child *can not recover* damages for loss of companionship, mental pain and suffering arising from a medical malpractice action. Otherwise the range of awardable economic damages under the voluntary binding arbitration provisions of the medical malpractice act is broader than the range of damages awardable under the Wrongful Death Act. Under the Wrongful Death Act, the loss of earning capacity, past and future medical expenses, past and future loss of services as elements of damages are not available. Each survivor is limited to recovering the value of lost support and services from the date of the decedent’s injury to her or his death, and future loss of support and services from the date of death and reduced to present value; and the estate may recover the decedent’s loss of earnings, loss of prospective net accumulations, and medical or funeral expenses.”<sup>23</sup>

#### **Award of Damages: Setoff of Settlement Proceeds**

A written release or covenant not to sue in partial satisfaction of damages sued for by the plaintiff entitles a defendant to a setoff of such amount against any judgment to which the

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<sup>22</sup> Paragraphs 766.102(2)(a) and (b), F.S.,

<sup>23</sup> See *St Mary’s Hospital v. Phillippe*, 769 So.2d 961, 972-973 (Fla. 2000) in which the Florida Supreme held that in medical malpractice arbitration, the medical malpractice statute should determine how economic damages are calculated. The Court stated that “[u]nlike the Medical Malpractice Act, the Wrongful Death Act does not provide claimants with such a full range of economic damages.”

plaintiff would otherwise obtain at the time of judgment.<sup>24</sup> The same entitlement to setoff is provided under s. 768.041, F.S. The Florida Supreme Court has addressed whether a non-settling defendant is entitled to setoff or a reductions of damages based on payments by settling defendants in excess of their liability as apportioned by the jury. The court held that the setoff statutes apply to economic damages as found by the jury but not to noneconomic damages.<sup>25</sup>

### **Apportionment of Damages**

Various methods of apportioning damages are used in legal actions. Under the *doctrine of contributory negligence*, any fault on the part of the plaintiff bars recovery. Under the *doctrine of comparative fault*, each party is responsible to the extent of its proportion of fault and the court enters a judgment in a negligence case based on each party's proportion of liability.<sup>26</sup> Under the *doctrine of joint and several liability*, all defendants are responsible for the plaintiff's damages regardless of the extent of each defendant's fault in causing the plaintiff's damages.<sup>27</sup> Until recently, the doctrine of joint and several liability applied to joint tortfeasors such that the court entered a judgment with respect to the economic damages against the party holding him or her responsible for those damages for all parties until the plaintiff recovered all damages completely.

However, in 1999, Florida law was amended to abolish the doctrine of joint and several liability for non-economic damages, and to limit its applications as to economic damages. See ch. 99-225, L.O.F.; s. 768.81, F.S. As to economic damages, it established new limitations and maximum liability amounts, which increase with a defendant's share of fault and dependent on whether the plaintiff was at fault or not. Section 768.81, F.S., requires the court to enter judgment based on fault of the parties rather than joint and several liability in negligence cases. Section 768.81(3), F.S., provides a formula to be used by the courts to apportion damages when the plaintiff is found to be at fault.

There is an exception for statutory teaching hospitals sued in medical malpractice actions for injury or wrongful death, the court can only enter a judgment against the hospital solely for the amount based on its percentage of fault. In other words, the hospital can not be held joint and severally liable for the full amount of damages.<sup>28</sup> A claimant's only remedy for recovery under a judgment or settlement against a board of trustees of a state university in a medical malpractice is now through the legislative claim bill process.<sup>29</sup>

### **Itemized Verdicts and Alternative Methods of Payment of Damage Awards**

In a civil trial, a jury is required to itemize the damages it awards to a plaintiff.<sup>30</sup> The jury must separately determine the amounts for economic, noneconomic and punitive damages, if any, and

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<sup>24</sup> See s. 46.015, F.S.

<sup>25</sup> See *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995). See also *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001) in which the Florida Supreme Court held the setoff statutes do not apply to reduce a non-settling defendant's payment for liability. See *D'Angelo v. Fitzmaurice*, 832 So.2d 135, (2<sup>nd</sup> DCA 2002), in which the Second District Court of Appeals extended *Gouty* and held that setoff was not appropriate when a settling party was not placed on the jury verdict form.

<sup>26</sup> In 1986, the Florida Legislature codified the doctrine of comparative fault, which had been adopted by the Florida Supreme Court in 1973, to replace contributory negligence.

<sup>27</sup> See *Fabre v. Marin*, 623 So.2d 1182, 1184 (Fla. 1993).

<sup>28</sup> See s. 768.81(5), F.S. An identical provision exists in s. 766.112(1), F.S.

<sup>29</sup> See s. 766.112(2), F.S.

<sup>30</sup> See s. 768.77, F.S.

separately enter those amounts on the verdict form. An award may dictate a lump sum payment or periodic payment of future *economic* losses as itemized by the jury.<sup>31</sup>

“Periodic payment” is statutorily defined to be the payment of future *economic* damages in whole or in part, over a period of time, as follows:

- A specific finding of the dollar amount of periodic payment which will compensate for future damages after offset by collateral sources must be made;
- The defendant must post a bond or security to assure full payment of these damages awarded. The bond must be written by a company that is rated A+ by Bests. If the defendant is unable to adequately assure full payment of the damages, all damages reduced to present value shall be paid to the claimant; and
- The provision for payment of future damages must specify the recipient or recipients of payments.

### **Confidentiality of Patient Records**

Patient medical records are confidential under law with a few exceptions.<sup>32</sup> That is, medical records can not be shared with or provided to anyone without the consent of the patient. Medical records can only be released without a patient’s written authorization as follows:<sup>33</sup>

- When the person, firm, or corporation procured or furnished with the patient’s consent the examination or treatment underlying the medical record.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff;
- When a court subpoena has been issued and proper notice is given the patient or the patient’s legal representative by the party seeking such records; or
- When used as part of statistical and scientific research, the information in the medical records may be abstracted in such a way as to protect the identity of the patient or obtained through the written permission of the patient or the patient’s legal representative.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient’s medical records as part of a medical malpractice action.<sup>34</sup> The Court ruled that, pursuant to s. 455.241, F.S., (the predecessor to current s. 456.057(6), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient’s medical condition. The Court also held that the health care provider can only discuss the patient’s medical condition with his or her attorney in conjunction with the defense of the action. The Court determined that a defendant’s attorney *cannot have* ex parte discussions about the patient’s medical condition with any other treating health care provider.

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<sup>31</sup> See s. 768.78, F.S.

<sup>32</sup> See 456.057, F.S.

<sup>33</sup> See s. 456.057(5), F.S.

<sup>34</sup> *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

**Immunity: Good Samaritan Act**

Section 768.13, F.S., provides immunity from civil liability<sup>35</sup> to:

- Any person, including those licensed to practice medicine, who gratuitously and in good faith render emergency care or treatment either in direct response to emergency situations related to and arising out of a public health emergency declared pursuant to s. 381.00315, F.S., a state of emergency which has been declared pursuant to s. 252.36, F.S., or at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment. *The applicable standard of care is that the person acts as an ordinary reasonably prudent person would have acted under the same or similar circumstances;*
- Any hospital, any employee of such hospital working in a clinical area within the facility and providing patient care, and any person licensed to practice medicine who in good faith renders medical care or treatment necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition demanding immediate medical attention, for which the patient enters the hospital through its emergency room or trauma center or necessitated by a public health emergency declared pursuant to s. 381.00315, F.S. *The applicable standard of care is that the hospital or employee provided or failed to provide medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another. The immunity provided does not apply to specified acts or omissions.*
- Any person who is licensed to practice medicine, while acting as a staff member or with professional clinical privileges at a nonprofit medical facility, other than a hospital, or while performing health screening services, for care and treatment provided gratuitously in such capacity. *The applicable standard of care is that the person acts as a reasonably prudent person licensed to practice medicine would have acted under the same or similar circumstances.*
- Any person, including those licensed to practice veterinary medicine, who gratuitously and in good faith renders emergency care or treatment to an injured animal at the scene of an emergency on or adjacent to a roadway. *The applicable standard of care is that the person acts as a reasonably prudent person would have acted under the same or similar circumstances.*

**Sovereign Immunity**

The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent. In 1868, the Florida Constitution authorized the Florida Legislature to enact law waiving sovereign immunity.<sup>36</sup> The

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<sup>35</sup> Immunity from civil liability under the Good Samaritan Act is one of a number of immunity provisions for private persons or entities. There is statutory immunity under specified circumstances for privatized foster care providers, persons who assist in containing hazardous spills, volunteer team physicians, and volunteers for non-profit organizations. *See* ss. 409.1671, 768.128, 768.135, and 768.1355, F.S., respectively. With the exception of the privatized foster care providers, the other categories consist of individuals in their volunteer capacity.

<sup>36</sup> *See* Article X, s. 13, of the State Constitution, which states "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

Legislature enacted law that provided for limited sovereign immunity for the state, its agencies, and subdivisions.<sup>37</sup> That is, sovereign immunity for tort liability is waived for such entities but there is a monetary limit placed on what can be recovered under specified circumstances. There is a \$100,000 limit on a government's liability to a single person for claims arising out of a single incident and a \$200,000 limit for all claims arising from a single incident. Any amount in excess of those caps whether obtained through settlement or judgment can only be recovered through an act of the Legislature by way of a claims bill process.

Section 768.28(9), F.S., defines "officer, employee, or agent" to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S., any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the Department of Health, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.

The second form of sovereign immunity potentially available to private entities under contract with the government is set forth in s. 768.28(9), F.S. It states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent's torts. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.<sup>38</sup> The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.<sup>39</sup>

Under current law, certain health care providers are obligated under state and federal law to provide emergency services. The Emergency Medical Treatment and Active Labor Act, originally enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), requires primarily hospitals to provide medical screening to determine if an emergency medical condition exists for which emergency medical care must be provided regardless of ability to pay. See 42 U.S.C. s. 1395dd. Under specified scenarios, this federal obligation applies to physicians: 1) assigned on-call physician, 2) a physician who certifies a transfer order, and 3) physicians working at specialty hospitals. Florida has a similar law which requires a hospital with an emergency room or a trauma center to provide emergency services and care for any emergency medical condition whether the person arrived in person, by ambulance or by a necessary transfer. See ss. 395.1041, 395.401, and 401.45. Certain hospitals are also obligated to provide crisis stabilization for persons under the Baker Act under Part I of chapter 394, F.S. (relating to Mental Illness), and the Marchman Act under Part I of chapter 397, F.S. (relating to Alcohol and Substance Abuse). However, there is no sovereign immunity protection for the extent to which these providers are statutorily obligated to provide services under state and federal law.<sup>40</sup>

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<sup>37</sup> See s. 768.28, F.S.

<sup>38</sup> *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

<sup>39</sup> *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

<sup>40</sup> Notably, Florida law offers sovereign immunity protection to any person or organization who provides shelter space, without recompense other than reimbursement of costs, on their property for any actual, impending, mock or practice

**Liability of Health Care Facilities**

All health care facilities, including hospitals and ambulatory surgical centers, as defined in ch. 395, F.S., have a duty to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties. These duties include: the adoption of written procedures for the selection of staff members and a periodic review of the medical care and treatment rendered to patients by each member of the medical staff; the adoption of a comprehensive risk management program; and the initiation and diligent administration of medical review and risk management processes. Each such facility is liable for a failure to exercise due care in fulfilling one or more of these duties when such failure is a proximate cause of injury to a patient.

A Florida-licensed hospital is authorized under s. 766.110(2), F.S., to carry liability insurance or to adequately insure itself in an amount of not less than \$1.5 million per claim or annually \$5 million in the aggregate to cover all medical injuries to patients resulting from negligent acts or omissions on the part of those members of its medical staff who are covered thereby in furtherance of the requirements of ss. 458.320 and 459.0085, F.S. Sections 458.320 and 459.0085, F.S., require Florida-licensed allopathic physicians and osteopathic physicians to maintain malpractice insurance or other special financial responsibility to cover potential claims for medical malpractice as a condition of licensure, with specified exemptions.

Self-insurance coverage extended by a hospital under s. 766.110(2), F.S., to a member of a hospital's medical staff meets the financial responsibility requirements of ss. 458.320 and 459.0085, F.S., if the physician's coverage limits are not less than the minimum limits established in ss. 458.320 and 459.0085, F.S., and the hospital is a verified trauma center that has extended self-insurance coverage continuously to members of its medical staff for activities both inside and outside of the hospital. Any insurer authorized to write casualty insurance may make available, but is not required to write such coverage. The hospital may assess certain licensed physicians, nurses and dentists on an equitable and pro rata basis for a portion of the total hospital insurance cost for this coverage.

**III. Effect of Proposed Changes:**

**Section 1** provides legislative findings regarding the need for comprehensive medical malpractice legal reform.

**Section 2** amends s. 46.015, F.S., to require set-offs at trial if any defendant shows the court that the plaintiff, or his or her legal representative has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for. The set-off must be made against the total amount of the damages set forth in the verdict prior to the entry of a final judgment. The amount of the setoff must include all sums received by the plaintiff, including economic and noneconomic damages, costs, and attorney's fees.

**Section 3** amends s. 457.057, F.S., to provide that patient records may be disclosed if a medical information release was executed by a claimant in a medical malpractice claim under chapter 766, F.S. This release authorizes a defendant health care practitioner who is considered to be a health care provider under ch. 766, F.S., or his or her legal representative, to take unsworn statements from the claimant's treating physicians. The statements must be limited to areas that are potentially relevant to the claimant's alleged injury or illness.

**Section 4** amends s. 766.102, F.S., to remove language that allowed a health care provider to testify as an expert in any action even if he or she was *not* a "similar health care provider" but possessed sufficient training, experience, and knowledge as a result of practice or teaching in a specialty of the defendant or practice or teaching in a related field of medicine so as to be able to provide expert testimony. The term "similar health care provider" is redefined to require expert witnesses to have *in-kind training, experience, practice, and education and certification and licensure* as the person against or for whom someone prior to offering an expert opinion or testifying as to the prevailing professional standard of care in medical malpractice actions whether the person is a specialist, nonspecialist, or a general practitioner.

Specifically, if the incident involves a *specialist*, the expert witness must specialize in the same or similar specialty and must have devoted professional time during the 3 previous years to active clinical practice or consultation with same or similar health professionals, or to teaching in the same or similar health profession at an accredited health profession school or residency program, or to clinical research at a program at an accredited health professional or teaching hospital in the same or similar specialty. If the incident involves a nonspecialist, the expert witness must have devoted professional time during the 3 previous years to active clinical practice or consultation with same or similar health professionals, or to teaching in an accredited residency program in the same or similar health profession. If the incident involves a general practitioner, then the expert witness must have devoted professional time within the 5 preceding years to active clinical practice or consultation, to academic teaching at an accredited health professional school or residency program, or to clinical research at an accredited medical school or teaching hospital.

A physician licensed under chapter 458 or 459 can qualify as an expert witness under the law and testify to the applicable standard of care for support medical staff such as nurses, nurse practitioners, nurse midwives, physician assistants. In medical malpractice actions against a health care or medical facility, a person can offer expert witness testimony as to the appropriate standard of care relating to administrative and other nonclinical issues if the person has substantial knowledge as to such matters. If a health care provider is evaluating, treating, or diagnosing a condition not within his or her specialty, for purposes of the expert witness qualification, a specialist within that area is deemed a similar health care provider.

**Section 5** amends s. 766.106, F.S., to revise several presuit requirements. First, a claimant's presuit notice must include: 1) A list of all known health care providers seen by the claimant subsequent to the injury giving rise to the claim of malpractice, 2) A list of all known health care providers who evaluated or treated the claimant the two previous years, and 3) Copies of all medical records relied upon by the expert witness who verified the medical malpractice claim. A claimant must also execute a medical information release which authorizes a defendant or his or her legal representative to take *unsworn* statements from the claimant's treating physicians.

Additionally, any party can submit for response a maximum of 30 questions including subparts. A response is due within 20 days after receipt of the questions.

The section also provides that the defendant insurer's offer of admission of liability and offer to arbitrate means that liability is admitted and arbitration will only be held on the issue of damages once the offer is accepted.

This provision is effective October 1, 2003 and applicable to presuit notices sent on or after that date.

**Section 6** amends s. 766.108, F.S., to require mandatory mediation in medical negligence actions if voluntary binding arbitration has not been agreed to by the parties. Within 120 days after suit is filed, the parties must engage in mediation in accordance with s. 44.102, F.S. The Florida Rules of Civil Procedure will apply to such mediation.

**Section 7** amends s. 766.202, F.S., to revise the definitions relating to medical negligence actions. The terms "economic damages" and "noneconomic damages" are redefined to provide that the claimant's recovery is limited to the extent the claimant is entitled to recover such damages under general law,<sup>41</sup> including the Wrongful Death Act. This may reduce the range of economic damages recoverable as the damages recoverable under the Wrongful Death Act are limited by s. 768.21, F.S. The loss of earning capacity, past and future medical expenses, past and future loss of services as elements of damages are not available under the Wrongful Death Act.

The term "medical expert" is redefined to mean someone duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102, F.S. This revision will have the effect of changing the criteria for who may provide an expert opinion as to a medical malpractice claim.

**Section 8** amends s. 766.206, F.S., effective upon this act becoming a law and applicable to causes of action filed on or after that date. This section is revised to include reference to judicial review of the claim and the verified written medical expert opinion as part of the court's review requirements to dismiss a claim if the presuit notice of intent is not in compliance with presuit investigation requirements, to strike the defendant's pleading if the response is not in compliance with presuit investigation requirements, or to report the disqualification of an expert witness.

**Section 9** amends s. 766.207, F.S., relating to voluntary binding arbitration of medical negligence claims, to provide that any damages awarded pursuant to arbitration must be awarded as provided by general law, including the Wrongful Death Act, subject to limitations.

**Section 10** amends s. 768.041, F.S., relating to releases or covenants not to sue, to require set-offs at trial following an rejection of an offer to arbitrate in a medical malpractice action, if any defendant shows the court that the plaintiff, or his or her legal representative has delivered a

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<sup>41</sup> A law that operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible classification is a general law. *See City of Miami v. McGrath*, 824 So.2d 143 (Fla. 2002), citing to *State ex rel. Landis v. Harris*, 120 Fla. 555, 163 So. 237 (Fla.1934).

written release or covenant not to sue to any person in partial satisfaction of the damages sued for. The set-off must be made from the amount of the damages set forth in the verdict and before entry of the final judgment. The amount of the setoff must include all sums received by the plaintiff, including economic and noneconomic damages, costs, and attorney's fees.

**Section 11** provides legislative findings and intent relating to the importance of emergency services and care by specified health care providers and the commensurate need for immunity for these providers.

**Section 12** amends s. 768.13, F.S., to revise the scope of the civil immunity under the Good Samaritan Act extended to specified hospitals. Whereas current law limits immunity up until the patient is stabilized and can be treated as a nonemergency patient or until the patient is stabilized after surgery needed as a result of the emergency, after medical treatment for subsequent, the bill extends the immunity to any hospital, any employee of such hospital working in a clinical area within the facility and providing patient care, and any person licensed to practice medicine who *in good faith renders medical care or treatment necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition demanding immediate medical attention, for which the patient enters the hospital through its emergency room or trauma center.* This immunity is allegedly extended to capture "Code Blue" scenarios.

Immunity from civil liability is also extended to any health care practitioner as defined in s. 456.001(4), F.S, who while in the hospital in good faith responds and renders medical care or treatment to a patient with whom the practitioner has no pre-existing provider-patient relationship, when such care or treatment is necessitated by a sudden or unexpected situation or by an occurrence that demands immediate medical attention, unless the care or treatment is proven to amount to conduct demonstrating a reckless disregard for the life or health of the victim.

Immunity to these hospitals and providers does not apply if the act or omission of providing care is unrelated to the original medical emergency or there was a reckless disregard of the consequences. "Reckless disregard" means conduct that a health care provider knew or should have known, at the time such services were rendered, would be likely to result in injury so as to affect the life or health of another, taking into account the following, to the extent they may be present: the extent or serious nature of the circumstances prevailing; the lack of time or ability to obtain appropriate consultation; the lack of a prior patient-physician relationship; the inability to obtain an appropriate medical history of the patient; and the time constraints imposed by coexisting emergencies.

**Section 13** amends s. 768.28, F.S., to extend the waiver of sovereign immunity to health care providers who are obligated under federal and state law to provide emergency services and includes cross-references to those statutory provisions. As "protected" agents of the state or applicable agency or subdivision, this provider in return must indemnify the state for any liabilities incurred up to the statutory limit or the limits of the available insurance coverage. Therefore, if acting outside the scope of employment, such provider will not be covered. If the provider acted within the scope of employment but acted in bad faith or with malicious purpose in a manner exhibiting wanton and willful disregard of human rights, safety, or property, such provider will also not be covered. A health care provider protected under the sovereign

immunity does not include one who is providing emergency services to a person with the practitioner has an established provider-patient relationship outside the emergency room.

Emergency services is defined to include a list of services that may arise under the enumerated statutes requiring action by the health care provider and include “*all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time.*”

**Section 14** amends s. 768.77, F.S., to provide that in any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, to which the requirements of part II, ch. 768, F.S., applies, in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as part of the verdict, itemize the amounts to be awarded to the claimant in the following specific categories of damages:

- Amounts intended to compensate the claimant for past economic losses; and future economic losses, not reduced to present value, and the number of years or part thereof which the award is intended to cover;
- Amounts intended to compensate the claimant for past noneconomic losses and future noneconomic losses not reduced to present value, and the number or years or part thereof which the award is intended to cover; and
- Amounts awarded to the claimant for punitive damages, if applicable.

**Section 15** amends s. 768.81, F.S., to limit the apportionment of fault and damages in the jury verdict form solely to the claimant, if any, and all the joint tortfeasors who are parties to the action when the case is submitted to the jury. This represents a significant departure from the current law which allows the jury to apportion fault to those who are not named or no longer part of the action at the time the matter is submitted for a verdict.

**Section 16** provides a severability clause.

**Section 17** provides that the bill becomes effective, unless otherwise expressly stated, upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**D. Other Constitutional Issues:**

The bill requires a claimant in a medical malpractice action to execute a medical information release that authorizes a defendant or his or her legal representative to take unsworn testimony of the claimant's health care provider regarding the claimant's medical history and condition. This may implicate privacy considerations under the Florida Constitution and applicable federal law governing patient records.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Claimants of medical malpractice actions will be required to satisfy revised presuit requirements and undergo mandatory mediation to resolve claims in an effort to avoid litigation including trial. The extent of a claimant's recovery for damages at trial may be offset by the existence of other written releases or covenants and will be subject to the limits of awardable damages under the Wrongful Death Act in those claims involving death. These provisions including those regarding expert witness qualifications, however, may deter meritless claims, and encourage earlier settlement of meritorious claims.

**C. Government Sector Impact:**

The state government will incur additional costs to investigate and cover the claims for health care providers providing services in an emergency room or trauma center in Florida. It is unclear which state agency or local government will be responsible for monitoring the claims of such providers and handling the defense of such claims. It is unclear which governmental entity will be responsible for claims administration and management for those providers who are already covered by sovereign immunity.

**VI. Technical Deficiencies:**

A technical amendment is need to correct a statutory cross-reference to "395.401" in lieu of "s. 395.401." See page 27, line 23.

**VII. Related Issues:**

The criteria for who may be qualified as an expert witness may need review as it is not entirely clear whether there is intended to be 3 separate categories of expert witnesses: specialist,

nonspecialist and general practitioner. For example, a general practitioner may not necessarily include a family practitioner but a family practitioner does not qualify as a specialist.

There may be some ambiguity regarding the scope of economic and non-economic damages that are contemplated by reference to damages the claimant is entitled to under “general law including the Wrongful Death Act.” It is not clear whether the intent is to limit these damages exclusively or in addition to those damages provided under the Wrongful Death Act.

The bill provides limited sovereign immunity to health care providers acting in accordance with statutory obligations under various provisions of federal and state law. However, there is no reference to health care providers who must provide emergency crisis stabilization to persons as required to be treated under part I of the chapter 394, F.S. (Baker Act), or part I of chapter 395, F.S. (Marchman Act).

### **VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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